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\*321 MARRIAGE

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I don't believe in restricted clubs, [\[FN1\]](#) yet I belong to one by virtue of being married. Five years ago, when I was intimately involved with a woman, I could not imagine that I would ever want to get married. In this essay, I will explore some of the coercive elements of our society that would compel even me, a committed feminist, to marry. I will also discuss to what extent lesbian and gay people should be seeking to extend marriage to include their relationships. I will first briefly summarize the marriage debate that has been occurring within the lesbian and gay community and then provide my own position on this issue. Because the personal is political, I will relate some of my life history to explain my position.

Lesbian and gay people in our society cannot attain a legally recognized marriage. [\[FN2\]](#) Virtually no one in the lesbian and gay community believes that society should exclude lesbian and gay people from marriage. An impassioned debate, however, exists as to whether lesbian and gay activists should be seeking to extend marriage to people in same-sex relationships as a top priority. [\[FN3\]](#)

Opponents of same-sex marriage as a high priority argue that marriage is a sexist, patriarchal institution that lesbian and gay people should not be seeking to enter. [\[FN4\]](#) Entering that institution would simply contribute to our \*322 subordination at the hands of the state. Moreover, opponents argue that there is no reason to assume that same-sex relationships would actually gain social legitimacy by receiving this token state sanction. Instead, lesbian and gay people would sacrifice some of their anonymity, making them even easier targets for discrimination. [\[FN5\]](#) Finally, some opponents argue that if marriage is available, lesbian and gay people would be under strong pressure to marry, because benefits would be available only on that basis. [\[FN6\]](#) Thus, they argue that we should fight for recognition of a broader definition of family but not tie that recognition to the institution of marriage.

Advocates of lesbian and gay marriage as a high priority argue that as long as lesbian and gay people are denied this privilege, they are denied full citizenship. [\[FN7\]](#) While they recognize the possible problems with embracing marriage, because of its patriarchal history, they also suggest that allowing lesbian and gay people to enter marriage would transform the institution. Marriage could become an institution of intimacy between equals if same-sex couples could marry. [\[FN8\]](#) Thus, attaining marriage for lesbian and gay people should be a priority, because that step would make marriage-dependent benefits available to lesbian and gay people while radicalizing the institution of marriage.

I will now tell you where I personally fit into this debate, since the personal is political. I will then apply an anti-essentialist [\[FN9\]](#) perspective to this debate. One reason that I am providing some personal history is to get to one of my sub-issues: labelling. I get tired of rigid gay/straight labels, which certainly do not apply to my life. I, therefore, increasingly find it useful to come out of the closet as a bisexual in order to question those rigid labels.

I was involved in an intimate, sexual relationship [\[FN10\]](#) with a woman for seven years from 1980 to 1987. During that time, I really hated the institution of marriage. I would refuse to go to weddings of my straight [\[FN11\]](#) friends, because \*323 I felt that their marriages contributed to my own subordination. When straight friends got married, I usually contributed money in

their name to the Louisiana Sexual Privacy Project, [\[FN12\]](#) telling them that I was contributing this money so that lesbian and gay people could ultimately enjoy the privileges that they enjoy. At that time, I thought that the best strategy for attaining equality from a feminist as well as a lesbian perspective was to get straight people to stop marrying rather than to change the law to permit lesbian and gay people to be able to marry. I was quite baffled as to why so many of my straight friends got married when they knew that marriage was an exclusive private club that didn't want me as a member.

About a year and a half later, in late 1988 (when I was no longer intimately involved in a relationship with a woman), I decided to spend a semester at the University of Toronto. I met a man during that time with whom I became intimately involved, and we began to explore how we could both live in the same country together. Canadian universities have a Canada-first policy with respect to permanent positions, so that it became clear that the University could probably hire me only if I married my male partner, and thereby became a Canadian. The United States has very restrictive immigration rules so that, again, we could only readily enter the United States together if we got married. [\[FN13\]](#) I had told my partner that I would never get married so long as lesbian and gay people could not get married. Although he is not a lawyer, my partner started to follow the news and learned that the Canadian Charter of Rights and Freedoms was being interpreted in ways that suggested that lesbian and gay people might soon be able to marry in Canada. [\[FN14\]](#) As we began to talk about \*324 having a child, with my partner possibly staying home to look after the child on a part-time or full-time basis, it also became clear to me that society would treat us and the child coercively if we did not marry. For example, my partner would lose his health insurance in the United States if he went to less than full-time paid employment, and I could not cover him under my plan at work unless we were married. I talked to lots of my lesbian and gay friends who told me not to be a martyr on principle and go ahead and get married. [\[FN15\]](#) Thus, because of our society's coercive practices with respect to immigration and children, we got married in May 1990, and immigrated to the United States in August 1990. (Unfortunately, our plans to have children have been delayed as I have had two miscarriages. [\[FN16\]](#))

My own personal experience has confirmed my skepticism about embracing the institution of marriage. Marriage was not simply an available option for us-to be freely chosen. Instead, it was the only alternative available to us that would allow us to live together in the same county. It makes more sense to change institutions so that their benefits are not marriage-dependent rather than make lesbian and gay people eligible for these benefits only by getting married. If we eliminate marriage-dependent benefits then people can choose to embrace marriage for symbolic rather than legal or utilitarian reasons. For example, if benefits were available to self-defined family units, then handicapped people who live together and poor women with children who live together to share babysitting and household expenses could qualify for family-related benefits irrespective of whether they wanted to marry or even engage in intimate sexual activity.

A successful example of that strategy recently occurred in New York. Miguel Braschi had been evicted from his rent-controlled apartment after his male lover, Leslie Blanchard, died. [\[FN17\]](#) A state statute prohibited the eviction \*325 of a family member who was living with the deceased tenant at the time of the deceased's death. The New York Court of Appeals ruled that Braschi did qualify as a family member, defining a family as "two adult lifetime partners whose relationship is long term and characterized by an emotional and financial commitment and interdependence." [\[FN18\]](#) This definition was formulated so as to include lesbian and gay couples, as well as handicapped people or poor people who live together in order to share household expenses and responsibilities, whether or not those people engage in an intimate relationship.

Extending the Braschi theory, I would, therefore, rather change the immigration laws so that they are not marriage-dependant than work to permit lesbian and gay people to marry so that they can take advantage of that benefit. Similarly, I would like to work to change health care rules to enable workers to cover people other than their legal "spouses." [\[FN19\]](#)

Turning to an anti-essentialist perspective, [\[FN20\]](#) one problem with the account of the marriage debate that I have provided

so far is that it is based on a middle-class model. Employer-based health insurance is not available to unemployed people; even employment does not guarantee access to insurance or affordable health care. Rent control statutes are only available to people who can afford an apartment. The immigration laws' spousal preference is not available unless you can meet certain financial criteria. [FN21] Thus, the institution of marriage acted coercively in my life because I had the financial resources to take advantage of the privileges of marriage. Miguel Braschi benefitted from a broad definition of family because he could afford to pay rent on a rent-controlled apartment. For poor people, marriage may offer few economic advantages. It should not surprise us to learn that marriage is a much less popular institution in poor communities than in middle-class communities. Thus, in the lives of poor lesbian and gay people, it is probably more important to talk about creating universal health insurance or housing than it is talk about how lesbian and gay people can get their partner on their health insurance plan.

**\*326** The marriage debate in the lesbian and gay community reminds me a bit of the abortion debate in the feminist community. Many poor women say that they don't want to talk about abortion, they want to talk about how to get the state to stop coercing poor women into being sterilized, how to get the state to provide decent prenatal care for women so that their babies don't suffer from low birth weight. [FN22] Thus, I could imagine poor women in the lesbian community saying that they don't want to talk about marriage, they want to talk about universal health insurance and state-financed day care for children for whom women, gay or straight, almost always have primary social responsibility.

In sum, I think we should work to change the definition of family and the exclusive class-based ways that our society provides privileges, rather than encourage more people-gay or straight-to enter the institution of marriage. I do not oppose the passage of legislation that would open up marriage to lesbian and gay people; however, I would not encourage the lesbian and gay community to make such legislation a high priority item.

[FNd1]. Ruth Colker is the C.J. Morrow Professor of Law, Tulane University. This essay was delivered at the Gay and Lesbian Legal Issues panel at the Frontiers of Legal Thought Conference held at Duke Law School in January, 1991. It was also delivered at the University of Tennessee in April, 1991. I would like to thank Dana Lesseman, a student at Duke Law School, and Kelly Bryson, a student at the University of Tennessee, for inviting me to deliver this paper at their institutions.

[FN1]. I borrow this phrase from Lindsey Van Gelder. See Lindsey Van Gelder, Marriage as a Restricted Club, MS. MAGAZINE, Feb. 1984, at 59.

[FN2]. Some people mistakenly believe that lesbian or gay people in San Francisco or in Denmark can enjoy all of the privileges of marriage. There is, however, no jurisdiction that currently offers all of the privileges of marriage to lesbian or gay couples. Denmark has gone the farthest but, even under Danish law, lesbian and gay people are not provided with the privilege of adopting children. See Nan Hunter, Marriage, Law, and Gender: A Feminist Essay, 1 LAW & SEXUALITY: A REVIEW OF LESBIAN AND GAY LEGAL ISSUES (forthcoming 1991). Although several cities in the United States have passed partnership registration programs, these programs are powerless to provide lesbian and gay people with the privileges of marriage that are traditionally offered at the federal and state level. Partnership registration programs may be beneficial; however, they do not accord lesbian and gay people the full privileges of marriage.

[FN3]. Many of the ideas that I develop in this paper were formed in response to a Lesbian and Gay Rights Symposium held at Tulane Law School in October, 1990. My brief summary of many of the positions taken in that symposium cannot adequately describe the depth of the authors' analyses; I therefore strongly encourage the reader of this essay to read a longer discussion of the marriage debate in volume one of LAW & SEXUALITY: A REVIEW OF LESBIAN AND GAY LEGAL ISSUES. LAW & SEXUALITY is a student-run journal at Tulane Law School. It is one of the only journals in the United States devoted exclusively to lesbian and gay legal issues. The first issue will appear in July, 1991.

[FN4]. See, e.g., Mary Dunlap, *The Lesbian/Gay Marriage Debate: A Microcosm of Our Hopes and Troubles in the Nineties*, 1 LAW & SEXUALITY (forthcoming 1991).

[FN5]. See *id.*

[FN6]. See Nitya Duclos, *Some Complicating Thoughts About Same-Sex Marriage*, 1 LAW & SEXUALITY (forthcoming 1991).

[FN7]. See Kenneth Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624 (1980).

[FN8]. See Hunter, *supra* note 2.

[FN9]. See generally Angela Harris, [Race and Essentialism in Feminist Legal Theory](#), 42 *Stan. L. Rev.* 581 (1990); Elizabeth Spelman, *Inessential Woman: Problems of Exclusion in Feminist Thought* (1988); Nitya Duclos, *Lessons of Difference: Feminist Theory in Cultural Diversity*, 38 *Buff. L. Rev.* 325 (1990); Maria Lugones & Elizabeth Spelman, *Have We Got a Theory for You! Feminist Theory, Cultural Imperialism and the Demand for "The Woman's Voice,"* 6 *Women's Stud. Int'l F.* 573 (1983).

[FN10]. I should note that I don't know what the word "sexual" means in the context of an intimate relationship with a woman. My use of the word "sexual" is not intended to suggest any particular activities; it is only intended to indicate the high degree of intimacy in the relationship. I agree with Catharine MacKinnon's suggestion that we have no idea what the word sexual would mean if male-domination did not exist. See CATHARINE MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* 126-54 (1989). Thus, I don't know what the word "sexual" should or does mean in any context, and, in particular, in the context of an intimate relationship with a woman. Nevertheless, I persist in using the word without intending to endorse its conventional meaning.

[FN11]. I have trouble knowing what labels to use to describe my friends. Some of my friends who got married were committed heterosexuals who could not imagine a relationship with a person of the same sex. Others were bisexual and had been in intimate relationships with people of the same sex. I use the word "straight" only to communicate that they were not same-sex couples. (Language is difficult; I don't want to call them opposite sex couples because the adjective "opposite" suggests a false bipolarization. In addition, "same sex" applies a false uniformity.)

[FN12]. The Louisiana Sexual Privacy Project is a project of the Louisiana affiliate of the American Civil Liberties Union. It was created sometime in 1985 to help provide funding for lesbian and gay rights cases.

[FN13]. When we were discussing how to live in the same country, we discovered the doubly coercive nature of our immigration laws. Had my partner been a woman, the United States, at one time, could have excluded him from entry for being a "homosexual." See, e.g., [Boutlier v. Immigration and Naturalization Service](#), 387 U.S. 118 (1967) (affirming exclusion of homosexuals under Immigration and Nationality Act of 1952). By contrast, if my male partner and I were to marry, he would be entitled to first-preference admission as a spouse. See Immigration and Nationality Act of 1952, as amended, 8 U.S.C. 1151(a)& (b) (1988) (spouses are immediate relatives who are not covered by numerical limitations). Thus, lesbian and gay people were excluded while married heterosexuals were given first preference. The Immigration Laws, therefore, encouraged people to be both heterosexual and married. In the past year, some modest progress to eliminate this coercion has occurred. The Immigration and Naturalization Act has been amended so that homosexuality is no longer a ground for exclusion. See Act of Nov. 29, 1990, [Pub. L. No. 101- 649](#), which no longer contains "sexual deviation" as a ground for exclusion. For further explanation, see H.R. No. 101-723(I), which states that "in order to make it clear that the United States does not view

personal decisions about sexual orientation as a danger to other people in our society, the bill repeals the 'sexual deviation' exclusion ground." Although lesbian and gay people are no longer subject to absolute exclusion, they still are not permitted to enter the United States under the first preference for married people.

[FN14]. More recent court decisions, however, are not so promising. See, e.g., *R. v. Andrews*, 65 O.R. 161 (2d) (Ct. App. 1988) (holding that Ontario Health Insurance Plan did not violate Canadian Charter of Rights and Freedoms by defining family so as not to include gay families). Nevertheless, changes may soon be occurring in Ontario under the leadership of the new premier, Bob Rae, who is a member of the New Democratic Party. Rae has already modified Ontario legislation so that public employees receive benefits without regard to sexual orientation. I do not know whether he plans to modify the marriage laws.

[FN15]. To the extent that the reactions of my lesbian and gay friends have been negative, that reaction has more to do with the sex of my partner than with my embracing the institution of marriage. Some friends, for example, told me that they could no longer trust me or feel comfortable with me socially if I were involved with a man. Other friends said that I could no longer be a good role model for lesbians. Those of my friends who stood by me while I dated men were generally supportive of my marriage. They wanted me to be able to live and work in the United States on feminist and gay issues in a supportive personal environment. Nevertheless, I have never felt comfortable with my decision to enter the institution of marriage. Because I did not feel comfortable asking them to embrace this public institution with me and to take on the expenses of traveling to Canada, I chose not to invite any of my friends to our marriage ceremony. Interestingly, one of my lesbian friends told me that she wished that I had invited her to the ceremony because she would then have felt more certain that she was still part of my life. We have, however, subsequently spent a lot of private time together which, I believe, was a more meaningful way to demonstrate to her that she is still a major part of my life.

[FN16]. Many people may consider it inappropriate for me to share news about those miscarriages. I have done so quite deliberately because I think that our silence about the early stages of women's pregnancies is often destructive to women. Although half of all women apparently experience miscarriages and fifteen to twenty percent of all pregnancies end in miscarriages, there is enormous silence about this phenomenon. Women are told not to tell anyone that they are pregnant until the second trimester, thereby causing them to suffer in silence during the first trimester of their pregnancy if they are sick and nauseous or experience a miscarriage. By publicly sharing my own miscarriages, I hope to encourage other women to share their first-trimester pregnancy experiences and break the silence.

[FN17]. See [Braschi v. Stahl Assoc.'s Co.](#), 74 N.Y.2d 201, 543 N.E.2d 49, 544 N.Y.S.2d 784 (1989).

[FN18]. [Id. at 211, 543 N.E. 2d at 54, N.Y.S.2d at 789.](#)

[FN19]. Professor Gene Schultz suggested to me that we should even go further—that there is no reason to tie benefits to "families." For example, as a faculty member at Tulane University, I can get free tuition for a member of my immediate family. But why shouldn't I be allowed to get free tuition for any designated member of the community at large? By limiting benefits to family members, we gain the privilege of extending benefits to people of the same socio-economic class as ourselves. A poor high school student in New Orleans is probably more deserving of free tuition to Tulane University than my husband, yet the university rules do not provide me with the option of extending the free tuition to the poor high school student. Just think how much we could improve the provision of health care if we each had the option of adding one non-related individual to our health insurance plans! At this time in our history, however, that kind of extension is virtually unthinkable.

[FN20]. This anti-essentialism critique has been strongly influenced by Nitya Duclos. See Duclos, *supra* note 6.

[FN21]. Because my spouse did not enter under a work permit, I had to file an affidavit of financial support on his behalf. In addition, we both had to promise that he would not seek to use the welfare system of the United States. The Immigration and Nationality Act does not appear, on its face, to require such disclosures; however, it gives discretion to the administrative agency to create certain documentary requirements. See [8 U.S.C. 1202\(b\)](#).

[FN22]. See ANGELA DAVIS, Racism, Birth Control & Reproductive Rights, in WOMEN, RACE, AND CLASS 159 (1981).

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